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5                   UNITED STATES DISTRICT COURT  
6                   WESTERN DISTRICT OF WASHINGTON  
7                   AT SEATTLE

8                   JOSHUA LEE REDDING,

9                   Plaintiff,

10                  v.

11                  CORRECTIONAL OFFICER GRIFFITH,

12                  Defendant.

13                   Case No. C18-1536 BJR-BAT

14                   **ORDER DENYING PLAINTIFF'S  
15 MOTION FOR SUMMARY  
16 JUDGMENT**

17                  On April 17, 2019, the court dismissed all claims and defendants, except the excessive  
18 force claim against Defendant Deputy Scott Griffith. Dkt. 16. On November 13, 2019, the court  
19 denied Defendant Griffith's motion for summary judgment because a material dispute remains as  
20 to whether the force Defendant Griffith applied to Plaintiff on August 20, 2018 was unreasonable  
21 under the circumstances. Dkt. 52 (Report and Recommendation); Dkt. 55 (Order Adopting).

22                  This case is set for a bench trial on August 3, 2020. Dkt. 80. Deadlines for discovery,  
23 dispositive motions, expert reports, and exhibits and witness lists have all passed. On June 1,  
24 2020, Plaintiff Joshua Redding filed a motion for summary judgment, asserting that there is no  
25 material issue of fact as to whether Defendant Griffith negligently forgot to double-lock his  
handcuffs, which caused injury to Plaintiff's wrists. Dkt. 95.

26                  Defendant Griffith opposes the motion for summary judgment because it is untimely,  
27 Plaintiff never plead a claim of negligence in his Complaint and is precluded from asserting a  
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1 state law claim of negligence; and, Defendant disputes the degree of injury claimed by Plaintiff.  
2 Dkt. 107.

3 In reply, Plaintiff argues that however his claim is characterized, the evidence shows  
4 injury to his wrists. Dkt. 110. Plaintiff attaches “some medical documentation showing injury” to  
5 his wrists, which consists of unauthenticated excerpts of a December 20, 2019 report by Patrick  
6 N. Bays, DO, indicating a “bilateral wrist nerve impingement” from the August 30, 2018  
7 incident. Dkt. 110, p. 4. Plaintiff also provides unauthenticated excerpts from his chart history,  
8 which appear to have been produced to him in discovery (*see* bate-stamping “Redding\_000906-  
9 907).

10 For the reasons stated herein, Plaintiff’s motion for summary judgment is denied.

## 11 DISCUSSION

### 12 A. Facts Asserted and Relevant Procedural Background

13 Plaintiff alleges in his Complaint that Defendant Griffith used excessive force against  
14 him during a routine transport in the Jail on August 30, 2018. Dkt. 4. Plaintiff did not raise a  
15 claim of negligence in his Complaint. *Id.* Plaintiff’s motion for summary judgment, filed on June  
16 1, 2020, states, in its entirety:

17 O.K. So the Defendant Scott Griffith is not Denying that he Negligently forgot to  
18 Double lock the Cuffs and they are not Denying that this Caused me injury to my  
19 wrists. And there is an Expert Report that says there was damage to my wrists,  
and Doctor’s reports with Damage to my wrists and I still have a big Scar where  
the Cuffs bit into my wrist all the way to bone.

20 Can I at least get a summary judgement on this matter.

21 Dkt. 95.

22 Defendant Griffith admits that he forgot to double-lock the handcuffs he put on Plaintiff.  
23 Dkt. 19 at 3; Dkt. 22 (Declaration of Scott Griffith) at 2. However, Defendant Griffith disputes

1 that his failure to double-lock the handcuffs resulted in injury. *See* Dkt. 23 (Declaration of Donna  
 2 Miles) at 2; Dkt. 25 (Declaration of Dan Miller). Defendant Griffith loosened the handcuffs  
 3 when he realized that he had forgotten to double-lock them. Dkt. 22 (Griffith Decl.) at 4-5.

4 The dispositive motions cut-off date was August 23, 2019. Dkt. 17. On September 11,  
 5 2019, Plaintiff filed a Claim for Damages with the Snohomish County Risk Management  
 6 Division. Dkt. 108, Bosch Decl., Ex. A.

7 B. Standard of Review

8 The Court shall grant summary judgment if the movant shows that there is no genuine  
 9 dispute as to any material fact, and the movant is entitled to judgment as a matter of law. Fed. R.  
 10 Civ. P. 56(a). The moving party has the initial burden of production to demonstrate the absence  
 11 of any genuine issue of material fact. Fed. R. Civ. P. 56(a); *see Devereaux v. Abbey*, 263 F.3d  
 12 1070, 1076 (9th Cir. 2001) (en banc). To carry this burden, the moving party need not introduce  
 13 any affirmative evidence (such as affidavits or deposition excerpts) but may simply point out the  
 14 absence of evidence to support the nonmoving party's case. *Fairbank v. Wunderman Cato*  
 15 *Johnson*, 212 F.3d 528, 532 (9th Cir. 2000). A nonmoving party's failure to comply with local  
 16 rules in opposing a motion for summary judgment does not relieve the moving party of its  
 17 affirmative duty to demonstrate entitlement to judgment as a matter of law. *Martinez v.*  
 18 *Stanford*, 323 F.3d 1178, 1182-83 (9th Cir. 2003).

19 "If the moving party shows the absence of a genuine issue of material fact, the non-  
 20 moving party must go beyond the pleadings and 'set forth specific facts' that show a genuine  
 21 issue for trial." *Leisek v. Brightwood Corp.*, 278 F.3d 895, 898 (9th Cir. 2002) (*citing Celotex*  
 22 *Corp. v. Catrett*, 477 U.S. 317, 323-24 (1986)). The non-moving party may not rely upon mere  
 23 allegations or denials in the pleadings but must set forth specific facts showing that there exists a

1 genuine issue for trial. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 249 (1986). A plaintiff  
 2 must “produce at least some significant probative evidence tending to support” the allegations in  
 3 the complaint. *Smolen v. Deloitte, Haskins & Sells*, 921 F.2d 959, 963 (9th Cir. 1990).

4 Factual disputes whose resolution would not affect the outcome of the suit are irrelevant  
 5 to the consideration of a motion for summary judgment. *Anderson*, 477 U.S. at 248. In other  
 6 words, “summary judgment should be granted where the nonmoving party fails to offer evidence  
 7 from which a reasonable jury could return a verdict in its favor.” *Triton Energy Corp. v. Square*  
 8 *D Co.*, 68 F.3d 1216, 1121 (9th Cir. 1995).

9 C. Timeliness of Plaintiff’s Motion

10 Plaintiff’s motion for summary judgment comes more than nine months after the  
 11 dispositive motions cut off. “When an act … must be done within a specified time, the court may,  
 12 for good cause, extend the time … on motion made after the time has expired if the party failed to  
 13 act because of excusable neglect.” Fed. R. Civ. P. 6(b)(1)(B).

14 Plaintiff did not seek leave to file a late summary judgment motion and has failed to  
 15 demonstrate “good cause” or “excusable neglect” for his failure to timely file a dispositive  
 16 motion within the deadline set by the court. Accordingly, his motion may be denied on this  
 17 ground alone.

18 D. Claim of Negligence

19 It is well-settled in the Ninth Circuit that parties generally cannot assert unpled theories  
 20 for the first time at the summary judgment stage. *See Navajo Nation v. United States Forest*  
*Serv.*, 535 F.3d 1058, 1080 (9th Cir. 2008); *see also Wasco Products, Inc. v. Southwall Techs., Inc.*, 435 F.3d 989, 992 (9th Cir. 2006) (“Simply put, summary judgment is not a procedural  
 23 second chance to flesh out inadequate pleadings”); *Pickern v. Pier 1 Imports (U.S.), Inc.*, 457

1 F.3d 963, 968-69 (9th Cir. 2006) (new factual allegations raised for the first time in a summary  
2 judgment response do not provide adequate notice to defendants of the allegations).

3 Thus, Plaintiff cannot now assert new theories of liability. In addition, because Plaintiff  
4 failed to properly comply with Washington State's Claim Filing procedure, he is precluded from  
5 maintaining a state-law claim of negligence against Defendant Griffith. RCW 4.96.020 mandates  
6 that at least sixty days prior to filing a lawsuit, a claimant alleging a personal injury claim against  
7 an employee of a local government entity must file a claim for damage form with that entity. *See*  
8 *also* RCW 4.96.010. Although Plaintiff filed a Claim for Damage form, he did so almost a year  
9 after the commencement of the lawsuit. See Dkt. 4 (Complaint, filed October 22, 2018); Dkt.  
10 108, Bosch Decl., Ex. A (Claim for Damage, filed with Snohomish County Risk Management on  
11 September 11, 2019).

12 Because Plaintiff's claim of negligence is futile, his motion for summary judgment on  
13 this basis is denied.

14 E. Genuine Issues of Material Facts Precluding Summary Judgment

15 Plaintiff argues that no matter how his claim is characterized (*i.e.*, whether negligence or  
16 a constitutional violation under the Eighth and Fourteenth Amendment), he is entitled to  
17 summary judgment. Even liberally construing Plaintiff's motion and construing all facts in his  
18 favor, the court concludes that summary judgment is not appropriate at this stage because there  
19 remain genuine issues of material fact.

20 Under the Eighth Amendment, courts consider, in situations where a jailor uses force to  
21 quell a disturbance, whether defendant's post-conviction acts inflicted unnecessary and wanton  
22 pain; whether the force used was applied in good faith or maliciously; the extent of injury  
23 suffered; the need to apply force; the relationship between the need to use force and the amount

1 of force; the threat reasonably perceived by the jailor; and efforts made to temper the severity of  
2 the force used. *See Martinez v. Stanford*, 323 F.3d 1178, 1184 (9th Cir. 2003) (elements of  
3 excessive force claim under the Eighth Amendment standard applicable to prisoners) (citations  
4 and quotations omitted).

5 Under the Fourteenth Amendment, applicable to pre-trial detainees, the Court considers  
6 whether the plaintiff has shown the force defendant purposefully or knowingly used was  
7 objectively unreasonable. *Kingsley v. Hendrickson*, — U.S. —, 135 S. Ct. 2466, 2473 (2015)  
8 (elements of excessive force claim under the Fourteenth Amendment standard applicable to  
9 pretrial detainees). Objective reasonableness depends upon the facts and circumstances of each  
10 case. *Id.* The Court must make a determination based upon the perspective of a reasonable  
11 officer on the scene and not with 20/20 hindsight. *Id.* A court must also account for the need to  
12 manage a jail and preserve internal order and discipline. *Id.* The Court should consider the  
13 relationship between the force used and the need for force; the extent of plaintiff's injuries; the  
14 severity of the security problem; and whether plaintiff was actively resisting. *Id.*

15 This court has previously noted that in this case, there remain material issues of fact as to  
16 the exact nature of Plaintiff's acts, the amount of force Defendant Griffith applied under the  
17 circumstances, and whether that force was reasonable. *See* Dkt. 52. Furthermore, although  
18 Defendant Griffith admits that he forgot to double-lock the handcuffs prior to transporting  
19 Plaintiff, Defendant Griffith disputes that the failure to double-lock the handcuffs resulted in  
20 injury to Plaintiff. For example, while Plaintiff maintains that the handcuffs cut him "all the way  
21 to the bone," Defendant Griffith maintains that this is flatly contradicted by the nature of  
22 Plaintiff's injuries recorded by Jail medical personnel who subsequently examined him. *See* Dkt.  
23 23 at 2 (Declaration of Nurse Donna Miles, who examined Plaintiff immediately after the

1 transport, and did not note any cuts to Mr. Redding's wrists); Dkt. 25 at 2 (Declaration of ARNP  
2 Dan Miller, who noted Plaintiff's subjective report of numbness but did not note any cuts to the  
3 wrists).

4 Additionally, Plaintiff claims that he asked Defendant Griffith to loosen the handcuffs.  
5 Dkt. 102 at 2. Defendant Griffith disputes this version of events. *See* Dkt. 22 (Declaration of  
6 Scott Griffith); Dkt. 103 at 3-4 (Admitted Facts Section of Proposed Pretrial Order). This too  
7 creates a genuine issue of material fact.

8 Thus, under any potentially applicable standard, the court concludes that triable issues of  
9 material fact remain as to Defendant Griffith's use of force and whether Defendant Griffith's  
10 failure to double-lock the handcuffs caused injury to Plaintiff's wrists. Given these disputes of  
11 material fact and viewing the evidence in the light most favorable to Plaintiff, the Court  
12 **DENIES** Plaintiff's motion for summary judgment (Dkt. 95).

13 DATED this 10th day of July, 2020.

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17 BRIAN A. TSUCHIDA  
18 Chief United States Magistrate Judge  
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